ATTACHMENT C

ORAL ARGUMENT REQUESTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-9518

U S WEST, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

BELLSOUTH CORPORATION and
SBC COMMUNICATIONS INC., *et al.*,

Intervenors.

On Petition for Review of an Order
of the Federal Communications Commission

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner U S WEST and Intervenors BellSouth Corporation and SBC Communications Inc. submit the following corporate disclosure statements:

U S WEST, Inc.

On June 12, 1998, the former U S WEST, Inc. (subsequently renamed MediaOne Group, Inc.) consummated a transaction whereby it was separated into two independent companies. The former U S WEST, Inc. had conducted its businesses through two groups, the U S WEST Communications Group ("Communications Group") and the U S WEST Media Group ("Media

Group"). Pursuant to the separation, the former U S WEST, Inc. contributed the businesses of the Communications Group and the domestic directories business of the Media Group ("Dex") to USWC, Inc. (which was subsequently renamed U S WEST, Inc. and is referred to as follows as "U S WEST"). As a result of the separation, U S WEST became an independent company conducting the businesses of the Communications Group, Dex and other subsidiaries. MediaOne Group, Inc. continues as an independent company conducting the businesses of the Media Group other than Dex.

U S WEST is a publicly-held corporation that provides services to the public only through its operating subsidiaries. U S WEST is the parent holding company of U S WEST Communications, Inc., a local exchange carrier that provides local exchange telecommunications, exchange access, wireless, and long distance services pursuant to tariff and contract in 14 western and mid-western states (formerly separately incorporated as The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company).

The following U S WEST entities have securities in the hands of the public:

U S WEST, Inc.
U S WEST Communications, Inc.
U S WEST Capital Funding, Inc.

U S WEST owns other subsidiaries that market unregulated products and services, none of which has issued debt or stock to the public.

BellSouth Corporation

BellSouth Corporation is a publicly held corporation and has equity securities in the hands of the public. It is principally in the business of providing communications services and products to the general public. BellSouth Corporation's wholly owned subsidiaries have issued debt securities to the public as obligations of BellSouth Telecommunications, Inc., Southern Bell

Telephone and Telegraph Company, South Central Bell Telephone Company, Harbinger Corporation, Tele 2000 S.A., BellSouth Capital Funding Corporation, BellSouth Savings and Security ESOP Trust, and BellSouth Savings and Employee Stock Ownership Trust.

SBC Communications Inc.

SBC Communications Inc. (formerly Southwestern Bell Corporation) is a publicly held corporation with equities and debt in the hands of the general public. The principal directly and indirectly held subsidiaries of SBC Communications Inc. include Pacific Telesis Group; Pacific Bell; Nevada Bell; Southwestern Bell Telephone Company; SBC Wireless, Inc.; Southwestern Bell Yellow Pages, Inc.; Pacific Bell Directory; and SBC International, Inc. The subsidiaries of SBC Communications Inc. are principally engaged in the business of providing communications services and products to the general public.

SBC Communications Inc., Southwestern Bell Telephone Company, and SBC Communications Capital Corporation have publicly held debt. A trust established and funded by Pacific Telesis Group has issued "Trust Originated Preferred Securities" to the public. Pacific Bell, Nevada Bell, and PacTel Capital Resources, subsidiaries of Pacific Telesis Group, have issued debt securities to the public. SBC and Pacific Telesis Group have guaranteed the repayment of certain trust originated preferred securities that have been issued to the public. In addition, certain indirectly held subsidiaries of SBC Wireless, Inc., have small groups of minority shareholders.

No other affiliates of SBC Communications Inc. have outstanding debt or equity securities that are publicly held.

SBC Communications Inc. currently anticipates completing its pending acquisition of Southern New England Telecommunications Corporation ("SNET") later this year.

Respectfully submitted,

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August 13, 1998

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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(a), petitioner and intervenors certify that there are no prior or related appeals in this Court.

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BRIEF FOR PETITIONER AND INTERVENORS

JURISDICTION

This action seeks review of an *Order* of the Federal Communications Commission ("FCC"): *Second Report and Order and Further Notice of Proposed Rulemaking: In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, FCC 98-27, CC Docket Nos. 96-115 and 96-149 ("*CPNI Order*"). The *CPNI Order* was released on February 26, 1998, with a summary published in the Federal Register on April

24, 1998. 63 Fed. Reg. 20326. The *CPNI Order* was also subsequently published in the FCC Record (see attahed hereto). 13 FCC Rcd. 8061 (1998). A timely petition for review was filed on May 18, 1998. This Court has jurisdiction of this petition for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUES

Whether the *CPNI Order* and accompanying rule amendments are, in whole or in part, arbitrary, capricious, an abuse of discretion, in violation of 47 U.S.C. § 222 and related provisions of the Communications Act as amended, or otherwise not in accordance with law.

Whether the *CPNI Order* and accompanying rule amendments are, in whole or in part, contrary to constitutional right, power, privilege or immunity in that they violate:

- the freedom of speech and press guaranteed by the First Amendment to the United States Constitution; and
- the takings and/or due process clauses of the Fifth Amendment to the United States Constitution.

Whether the *CPNI Order* and accompanying rule amendments are, in whole or in part, arbitrary, capricious and not in accordance with law in that the FCC failed adequately to consider the serious constitutional questions raised by the CPNI rules.

STATUTES AND REGULATIONS

47 U.S.C. § 222 and the Final Rules adopted pursuant to the *CPNI Order* are reprinted in the appendix to this brief.

STATEMENT OF THE CASE

A. Introduction

This case involves the FCC's rules preventing telecommunications carriers from using certain kinds of their business information to speak to their customers unless the carriers first obtain the customers' affirmative consent. For example, the FCC's rules preclude local telephone companies from using business information about their customers to determine

whether a specific customer would be interested in hearing about voicemail services or cellular or other wireless offerings, in the absence of the customer's prior affirmative consent permitting this information to be used for such a purpose.

More specifically, this case concerns FCC regulations implementing the otherwise self-effectuating Section 222 of the Federal Telecommunications Act of 1996, 47 U.S.C. § 222, which addresses Consumer Proprietary Network Information ("CPNI"). CPNI is valuable commercial information that a telecommunications carrier generates or accumulates in the course of doing business with individual members of the public. CPNI includes information about what telecommunications services customers purchase — such as number of lines, how they are used (for example, whether customers have three-way calling, call waiting, Caller I.D., or whether they make use of "star-69" for automatic redialing of the last number called), and information about calling patterns (for example, toll call detail.).[1] To telecommunications carriers, including local exchange, long distance, and wireless carriers, CPNI is comparable to the information that credit card companies, grocery stores, mail-order catalogs, banks, Internet service providers, and many other firms maintain about their customers' purchasing and usage characteristics, as part of their routine business operations.

As with other kinds of individually-identifiable customer information that companies collect and use within their business operations, CPNI allows telecommunications carriers to identify customers, on the basis of their past purchasing habits, who are most likely to be interested in particular new services, and to offer them information about packages of services through communications tailored to their individual needs. Without CPNI, if communications occur at all, they must take the form of blanket, undifferentiated, "broadcast-type" speech to any

[1] Section 222 defines CPNI as "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the customer-carrier relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." 47 U.S.C. § 222(f)(1).

and all customers, regardless of their individual service interests or needs. CPNI is thus essential for carriers to communicate with their customers effectively and to avoid undue intrusions on those individuals least likely to be interested in the communications.

In sum, this case involves the FCC's interposing itself into the service relationship between telecommunications carriers and their customers and interfering with protected speech and property rights. As will be demonstrated, that intrusion reflects a marked departure from well-settled regulatory policy, frustrates rather than reflects customers' expectations of their relationships with their existing carriers, and is in no way compelled by the statutory language or legislative history of Section 222. For these reasons, this Court should vacate the FCC's rules and remand the case for further consideration.

B. Regulatory History of FCC CPNI Rules

Prior to Congress' enactment of Section 222, the FCC had given extensive consideration to CPNI issues, although it had adopted rules only with regard to certain carriers and certain types of services. Throughout, the FCC had repeatedly rejected prior affirmative consent requirements for carriers in existing customer relationships. The FCC's rules generally permitted carriers to use CPNI to market new and innovative services without any expression of customer approval beyond that implied in the existing carrier-customer relationship. As a general rule, the FCC's rules were designed around periodic customer notifications and opt-out rights.

The FCC's CPNI rules were originally crafted when the Commission was considering whether to require certain carriers (AT&T and later the Bell Operating Companies ("BOCs")) to offer certain non-regulated services — customer premises equipment ("CPE") (such as telephone sets) and "enhanced services" (such as voicemail or Internet access) — through structurally separate subsidiaries.[2] The FCC ultimately decided *not* to require separate subsidiaries for these

[2] *See Second Computer Inquiry, Final Decision*, 77 FCC 2d 384, 481 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *qff'd sub nom. Computer & Communications Indus. Assn. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

non-regulated services,[3] and, in lieu of such separation, it established certain "competitive safeguards." CPNI rules were one of those safeguards.

The FCC's CPNI safeguards were limited to certain offerings by AT&T, the BOCs, and GTE.[4] Other carriers were free to use CPNI in any way they wished. Similarly, even for carriers subject to CPNI rules, services other than CPE, enhanced services, and certain cellular services were unaffected by the FCC's rules. For example, the FCC did not regulate CPNI use for credit card operations.[5]

Further, the FCC crafted its CPNI rules, where applicable, to avoid severe restrictions, such as a prior affirmative consent requirement, on the use of this valuable commercial

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[3] The Commission established a special rule with respect to cellular services offered by certain carriers, requiring that any carrier required to establish a separate cellular subsidiary was prohibited from providing CPNI to that subsidiary unless the CPNI was provided to others. 47 C.F.R. § 22.903(f).

[4] The BOCs, AT&T, and GTE were required to send annual notices of CPNI rights regarding enhanced services to all of their multi-line (2 or more lines) business customers. *Computer III Phase II Order*, 2 FCC Rcd. 3072, 3096 (1987); *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, 9 FCC Rcd. 4922, 4944-45 (1994). With respect to CPE, the BOCs were required to send annual notices to multi-line business customers, and AT&T was required to provide a one-time notice to its WATS and private line customers. Each notice included a response form that allowed the customer to restrict access to CPNI from the carriers' enhanced services and/or CPE marketing personnel.

In addition, the BOCs and GTE (but not AT&T) were required to obtain prior written authorization from business customers with 20 or more access lines before using CPNI to market enhanced services (but not CPE). *Computer III Remand Order*, 6 FCC Rcd 7571, 7609 (1991), *vacated in part and remanded*, 39 F.3d 919 (9th Cir. 1994). This requirement was adopted only on the basis of extensive record evidence and a showing that the account partner relationship between such customers and their carrier made it relatively easy for the carriers to communicate with the customers and secure the requisite approval. *See Computer III Remand Order*, 6 FCC Rcd. at 7611 ¶ 86; *Communications Satellite Corporation Petition for Declaratory Ruling*, 8 FCC Rcd. 1531, 1535 n.39 (1993). The constitutionality of the Commission's 20-lines rule was never adjudicated. For a more complete history of the FCC's CPNI rules, see the FCC's *Notice of Proposed Rulemaking ("NPRM")* 11 FCC Rcd. 12513, 12516 ¶ 4, 12530 ¶ 40 (1996) and *CPNI Order* at ¶¶ 174-79.

[5] *See In the Matter of BankAmerica Corporation, The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A. v. AT&T Co., Memorandum Opinion and Order*, 8 FCC Rcd. 8782, 8787 ¶¶ 26-27 (1993) ("*Universal Card Order*").

information. The Commission did so, in substantial part, because it recognized that such burdens would themselves have posed a form of "passive" structural separation on the affected carriers. [6] Having rejected operational structural separation on the ground that it hindered the efficient delivery of telecommunications and related services to the public, the FCC did not want to resurrect such separation through severe limitations on the use of CPNI. Such limitations, the FCC recognized, would have hindered one-stop shopping and joint marketing, thus defeating the important federal goals of carrier efficiencies and customer convenience.

In the FCC's *Computer III Remand Order*, 6 FCC Rcd. 7571 (1991), for example, the FCC rejected a prior customer authorization rule for enhanced services, reasoning that a large majority of mass market customers would fail to respond to a request for authorization, and that the resulting restriction on CPNI would be inefficient and anticompetitive:

> **Under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction**, and in order to serve them the BOCs would have to staff their business offices with network-services-only representatives, and establish separate marketing and sales forces for enhanced services. Thus, a prior authorization rule would **vitiate** a BOC's ability to achieve efficiencies through integrated marketing to smaller customers . . . .

Id. at 7610 n.155 (emphasis added). The Commission preempted state CPNI rules that might require prior authorization, "determining that such state rules would effectively negate federal policies promoting both carrier efficiency and consumer benefits."[7] The Ninth Circuit upheld this preemption, opining that a contrary determination could impede the efficient development of marketing strategies "for small customers."[8] The court added:

> The FCC found that BOC access to CPNI is justified because it allows customers the benefit of one-stop shopping which is important to the development of a mass market in enhanced services. The FCC found that the BOCs are uniquely positioned to reach small customers, and that it would be economically infeasible

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[6] *Phase II Recon. Order*, 3 FCC Rcd. at 1173 n. 83.

[7] *NPRM*, 11 FCC Rcd. at 12522 ¶ 16 (describing prior Commission policy).

[8] *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995).

> to develop a mass market for enhanced services if prior authorization was required for access to CPNI. **If small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option and thereby impair the development of the mass market for enhanced services in the small customer market.**[9]

A federal district court in Texas agreed. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 812 F. Supp. 706, 709, 710 (W.D. Tex. 1993) (upholding FCC's conclusion that "prior authorization rules would require separation of . . . marketing personnel, defeating the goal of integration of all marketing forces" and the goal of "increasing the market for enhanced services").

Subsequently, when AT&T acquired McCaw's cellular operations in 1995, the FCC refused to bar AT&T from sharing its long-distance service CPNI with its new cellular affiliate, finding that neither customer privacy nor competitive equity warranted such a prohibition. The FCC cited "consumer choice and efficiency" as the basis for its ruling, reasoning that any customers with contrary desires could opt out.[10] The FCC vigorously defended this view on appeal,[11] and the D.C. Circuit upheld the Commission's determination that allowing

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[9] *Id.* at 931 (emphasis added).

[10] *In re Applications of McCaw and AT&T Co.*, 10 FCC Rcd. 11786, 11794 (1995). "[W]e expect that permitting AT&T to disclose the information at issue to its cellular affiliates will increase competition for cellular customers as those affiliates, BOC cellular affiliates, and other providers seek to improve service and/or lower prices to attract and retain customers." *Id.* at 11792. *See also AT&T/McCaw Proceedings, Order*, 9 FCC Rcd. 5836, 5886 ¶ 83 (1994) (prohibiting the sharing of CPNI between AT&T and McCaw "would undercut one of the benefits of the . . . combination: the ability . . . to offer its customers the ability to engage in 'one-stop shopping' for their telecommunications needs").

[11] On appeal, the FCC explained that "courts have consistently recognized that capitalizing on informational efficiencies . . . is not the sort of conduct that harms competition," and that it "is manifestly pro-competitive and beneficial to consumers to allow a multi-product firm . . . maximum freedom in offering its competitive services to all of its customers" by utilizing CPNI. Brief for Appellee FCC in *Southwestern Bell Corp. v. FCC*, Nos. 94-1637, 94-1639, at 49 (D.C. Cir. filed Feb. 13, 1995). The FCC explained that CPNI restrictions would undermine AT&T's ability to offer "one-stop shopping" by bundling long-distance and cellular service together — "a significant public benefit." *Id.* at 46. "'One-stop shopping' results from allowing the carrier to employ an integrated marketing and sales force. Denying those who market complementary products access to CPNI, in effect, requires two sales forces within the same company." *Id.* at

AT&T/McCaw to use AT&T's long-distance CPNI to solicit the cellular customers of competing providers would "lead to lower prices and improved service offerings." *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1495 (D.C. Cir. 1995).

Hence, the FCC has concluded time and time again that a prior affirmative consent requirement to use CPNI was:

- unnecessary to protect competition; [12]
- at odds with efficient carrier operations;[13]
- at odds with joint marketing;[14]
- at odds with customers' desires for one-stop shopping;[15] and

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47. The FCC rejected the argument that CPNI protections were needed for "small businesses and individuals," explaining that the objectors had failed to explain how "'smaller' cellular customers could be harmed by access to information about competing services." *Id.* at 48.

[12] *Phase II Order*, 2 FCC Rcd. 3072, 3094 (1987); *Phase II Further Reconsideration Order*, 4 FCC Rcd 5927, 5929 (1989), *vacated on other grounds*, 905 F.2d 1217 (9th Cir. 1990).

[13] *See AT&T CPE Relief Order*, 102 FCC 2d 655, 678-79 ¶ 39 (1985) and *BOC CPE Relief Order*, 2 FCC Rcd. 143, 147 ¶ 29 (structural separation results in higher prices to consumers and a reduction in the quality and variety of service offerings due to an inhibition of research, development and innovation) (1987); *Phase I Order*, 104 FCC 2d at 1088 ¶ 258 (restrictions on use of customer information "impose a burden on all contacts between carriers and their customers, . . .substantially increase the difficulties attendant with providing customers a single point of contact, and prove extremely expensive to implement).

[14] *Computer III*, 3 FCC Rcd. 1150, 1162 ¶ 97 (1988) (to the extent carriers "use CPNI to identify certain customers whose needs are not being met effectively and to market an appropriate package of . . . services to such customers, customers would be benefited."); *BOC CPE Relief Order*, 2 FCC Rcd at 167 n.86 (internal CPNI use permits carriers to "engage . . . in joint planning and response to customer needs, that many customer apparently desire"); *Universal Card Order*, 8 FCC Rcd. 8782, 8786-88 ¶ 27 (1993) ("joint marketing . . . necessarily involves sharing of some customer network information").

[15] *See e.g., AT&T CPE Relief Order*, 102 FCC 2d at 692-93 ¶ 64 (noting that to deprive AT&T of CPNI use with respect to CPE sales would deprive it of the ability to offer one-stop shopping and would eliminate one of the fundamental consumer benefits associated with integration and access to such information); *BOC CPE Relief Order*, 2 FCC Rcd. 143, 147-48 ¶¶ 29, 31 (1987) (structural separation – and being cut off from CPNI – "prevent the BOCs from satisfactorily serving customers that desire integrated telecommunications systems solutions and designs. . . . [A] broad spectrum of communications users desire vendors that can be single sources for telecommunications products."); *Phase I NPRM*, 50 Fed. Reg. 33581, 33592 n. 58 (1985)

• unnecessary to protect consumer privacy.[16]

Indeed, even outside the CPNI context, the FCC has typically understood the utter impracticality of requiring affirmative customer consents and therefore has permitted notice-and-opt-out options.[17]

C. The 1996 Telecommunications Act

Against the background of the lengthy CPNI regulatory history, Congress adopted Section 222 in the 1996 Telecommunications Act. That Section applied CPNI rules to all carriers, rather than merely to AT&T, the BOCs, and GTE, as had been the FCC's previous approach. It also granted telecommunications carriers the right to use CPNI in their "provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service." 47 U.S.C. § 222(c)(1). In order for a telecommunications carrier to use CPNI for broader purposes, the use must be "required by law or with the approval of the customer" or must meet the exceptions stated in Section 222(d).[18]

("subscribers desire [ ] 'one stop shopping.'"); *1994 Public Notice*, 9 FCC Rcd. 1685 (1994) (FCC concluded that a prior authorization rule would, as a practical matter, deny to all but the largest business customers the benefits of one-stop shopping).

[16] *Computer III Phase II Recon. Order*, 3 FCC Rcd. 1150, 1163 ¶ 98 (1988) ("we anticipate that most of the BOCs network service customers . . . would not object to having their CPNI made available to the BOCs to increase the competitive offerings made to such customers"); *Phase II Order*, 2 FCC Rcd. 3072, 3094 ¶ 152 (1987) (prior authorization unnecessary to protect customer interests).

[17] For example, in the *BNA Second Recon. Order*, 8 FCC Rcd 8798, 8810 (1993), the Commission reversed a prior decision that required affirmative written authorization from customers with unlisted or unpublished numbers before local telephone companies were permitted to provide the customer's billing name and address ("BNA") information to unaffiliated telecommunications service providers. The FCC noted the "burden[some]" nature of requiring customers to "return[ ] authorization form[s]," *id.* at ¶ 68, and permitted carriers, once notification was made, "to presume that unlisted and nonpublished end users consent to disclosure and use of their BNA if they do not make [an] affirmative request" that such information not be disclosed. *Id.*

[18] These exceptions include the initiating, rendering and billing of service; fraud prevention; and the provision of inbound telemarketing, referral or administrative services on an inbound call if the customer approves of the use of CPNI during the call.

Other than these changes, Congress made no finding that the FCC's prior approach to CPNI was inadequate or contrary to the public interest.

Most importantly for purposes of this appeal, there is no indication in Section 222(c)(1) that Congress intended the word "approval" to require before-the-fact, affirmative customer consent. Indeed, Section 222(c)(1) stands in stark contrast to Section 222(c)(2), which requires telecommunications carriers to provide CPNI in their possession to any entity designated by the customer, "upon *affirmative* written request by the customer." (emphasis added). Notably, Section 222(c)(1) does not contain the word "affirmative," nor does it contain the term "express."

Section 222 was adopted in the context of sweeping telecommunications industry reforms designed to foster competition in all telecommunications markets. Properly read in accordance with well-established customer expectations, it grants carriers in existing customer relationships broad authority to use CPNI. Customers have the power to exercise choice and control by requesting any carrier to refrain from using certain information and to constrain the potential dissemination of customer information to parties unaffiliated with the carrier absent affirmative customer consent. In this manner, Congress itself struck the appropriate balance between (i) privacy interests and (ii) competitive efficiencies and carrier rights.

D. The FCC's *NPRM*

The FCC soon sought to revise the congressional balance. As a self-effectuating statutory provision, Section 222 required no independent FCC rulemaking.[19] However, in February of 1996, several local telephone company associations advised the FCC that their members — who unlike the BOCs, AT&T, and GTE had never been subject to CPNI rules — were unclear about their obligations under Section 222 and requested the Commission to provide "guidance" regarding such obligations. *CPNI Order* at ¶ 6 & n. 15. Subsequently, NYNEX, a BOC, filed a petition for a declaratory ruling regarding the proper interpretation of a single aspect of Section

[19] The FCC has acknowledged that Section 222 is self-executing. *See Computer III Remand Proceedings: Rules Governing Telephone Carriers' Use of Customer Proprietary Network Information*, 11 FCC Rcd. 16617, 16619 (1996).

222 — the scope of the phrase "telecommunications service" in subsection (c). The FCC responded by initiating a broad-based rulemaking regarding the meaning of virtually the entirety of the Section. *NPRM*, 11 FCC Rcd. 12513.

In the *NPRM*, the FCC read Section 222 as revolutionizing CPNI rules for telecommunications carriers. Under the guise of its interpretive and implementing authority, the FCC created a unique regulatory regime not comparable to the rules under which every other business in the United States operates — including companies that might compete with telecommunications carriers, such as cable operators.[20] Despite the long-standing absence of a prior authorization rule with respect to the use of CPNI (with the limited exception of marketing enhanced services to businesses having more than twenty lines), the FCC in the *NPRM* repeatedly referred to "prior"[21] customer "authorization"[22] as potentially being mandated by Section 222(c)(1), even though the words "prior" or "authorization" are never used in that subsection.

The Commission also set out its tentative conclusions regarding the meaning of the term "telecommunications service" as used in Section 222. It concluded that the term should be construed to reflect three separate "traditional service distinctions":[23] local exchange (including local long-distance or short-haul toll), interexchange (also including short-haul toll) and Commercial Mobile Radio Service ("CMRS" or "wireless").[24] The significance of the categories was that, barring appropriate customer "approval," carriers would be limited in their ability to use CPNI derived from one service category to communicate to customers about services not in that category.

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[20] Cable operators are free to use subscriber information internally and are obligated to secure affirmative consent only when releasing the information to unaffiliated third parties. 47 U.S.C. § 551.

[21] *NPRM* at 12523-26 ¶¶ 20, 23, 26 (prior authorization), 21 (prior approval).

[22] *Id.*

[23] *Id.* at 12523-24 ¶ 22.

[24] *Id.* at 12525 ¶ 24 and n. 60.

E. The Comments and Evidence Filed With the FCC

The *NPRM* raised the spectre that the FCC was proposing to disrupt seriously the carrier-customer relationship. Commentors[25] urged the Commission to reconsider its tentative views with respect to both the appropriate scope of the term "telecommunications service" and the construction of the word "approval." Various commentors argued that the word "approval" was capable of various constructions and urged the Commission to adopt a construction of the word consonant with reasonable customer expectations and commercial practices. They noted that "approval" could be construed in a variety of ways, ranging from tacit or implied approval stemming from an existing business relationship, to a notice-and-opt-out approval process in the context of an existing business relationship, to oral or written express consents. Essentially, commentors maintained that carriers should be able to determine what type of "approval" mechanism was appropriate under the self-effectuating Section 222. Certain commentors (petitioner and intervenors, for example) argued that the only "approval" mechanism that should be *prohibited* was the use of a notice-and-opt-out approval mechanism with respect to the disclosure of CPNI to unaffiliated third parties having no relationship with the customer.

1. Consumer Survey Evidence

Pacific Telesis (now a part of SBC Communications Inc.) provided the Commission with a statistically-valid public opinion survey on the use of CPNI by local telephone companies.[26] The survey was conducted under the leadership of Dr. Alan Westin, Professor of Public Law and Government at Columbia University and one of the world's foremost authorities on information policy and privacy. The study concluded that:

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[25] As part of the Designated Appendix to be submitted to the Court are included relevant filings and submissions of Petitioner, Intervenors (including Pacific Bell), as well as other carriers or associations pressing the salient points addressed in this "Statement of the Case," including Bell Atlantic, GTE, USTA, and AT&T.

[26] *Public Attitudes Toward Local Telephone Company Use of CPNI*: Report of a National Opinion Survey Conducted November 14-17, 1996, by Opinion Research Corporation, Princeton, N.J. and Prof. Alan F. Westin, Columbia University, Sponsored by Pacific Telesis Group ("Westin Survey").

1. The public has a great deal of confidence in telephone companies (particularly local companies) and trusts them to use the personal information they collect about customers in a responsible way and to protect its confidentiality.[27]

2. Despite a generalized concern over privacy issues, large majorities of the public believe it is acceptable for businesses, and in particular local telephone companies, to communicate with their own customers to offer them additional services,[28] especially if those not wishing such communications are provided with an opt-out opportunity.[29]

3. In particular, a large public majority believes that it is acceptable for local telephone companies to communicate with their customers using CPNI data.[30] The availability of an opt out procedure brings initial approvals of local telephone company use of CPNI from the two-out-of-three respondent level up to the 80% range of public approval.[31]

4. Individuals understand "notice and opt out" procedures, and many have used them in one context or another.[32]

5. Hispanics, African-Americans, women, young adults (18-24 years of age), persons who have used an opt-out previously, and persons who order many additional telephone services, all have an higher-than-average level of interest in receiving information about new services from telecommunications carriers.[33]

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[27] Westin Survey, Questions 2C, 3; Analysis at Item 5, pp. 5-7 ("the finding that 77% of the American public have medium to high trust in local telephone companies gives strong support to the idea that a voluntary program of notice and opt outs in local company use of customer information for offering additional telephone services would be regarded with confidence and approval by more than three out of four Americans").

[28] *Id.* Questions 7 (businesses generally), 9 (local telephone companies); Analysis at Item 7.

[29] *Id.* Questions 8 (businesses generally), 12 (local telephone companies); Analysis at Item 8.

[30] *Id.* Questions 10-11.

[31] *Id.* Questions 11-12; Analysis at Items 8-10, pp. 8-10.

[32] *Id.* Question 5 (familiarity with notice-and-opt-out), 6 (actual use of notice-and-opt-out); Analysis at 9-10 ("The CPNI survey found the respondents who have used opt outs in other business settings are willing to change their position from initial disapproval to positive views of customer-records-based communications by local telephone companies when" follow-up questions are asked).

[33] *Id.* Questions 9-11; Analysis at 9.

The Westin Survey confirmed other consumer survey evidence submitted into the record regarding customer expectations and CPNI use within the carrier-customer relationship. For example, Cincinnati Bell Telephone ("CBT") informed the Commission of a survey it conducted which demonstrated that customers were quite comfortable with carriers' using CPNI internally but believed that affirmative customer consent should be secured before CPNI could be disclosed to unaffiliated entities.[34] Like the Westin study, the CBT survey demonstrated that the "vast majority of customers surveyed (81.5%) want[ed] to be kept aware of the services" offered by their local carrier[35] and those same customers expected their carrier to use CPNI to tailor the communication.[36]

Additionally, U S WEST advised the FCC of a survey it had conducted which demonstrated that telephone customers were very interested in receiving information about packaged cable/telephone offerings.[37] Bell Atlantic cited to survey evidence demonstrating that 85.9% of respondents wanted to deal with a single carrier for all of their companies telecommunications needs[38] and noted another study documenting customer interest in one-stop shopping.[39]

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[34] CBT Comments, CC Docket No. 96-115, filed June 11, 1996 ("CBT Comments") at 9 and n.12. The FCC cited the CBT survey in the *CPNI Order* at nn. 224 and 230.

[35] CBT Comments at 8 and n.10 and Aragon Consulting Group Attachment A.

[36] *Id.* Aragon Question USE:INFO.

[37] U S WEST Opening Comments, CC Docket No. 96-115, filed June 11, 1996 at 6.

[38] Bell Atlantic Comments, CC Docket No. 96-115, filed June 11, 1996 at 6 (citing to a 1994 NFIB Foundation business survey, "Who Will Connect Small Businesses to the Information Superhighway?", at 22 (Dec. 1994)).

[39] *Id.* at 7 (citing to 1996 IDC/LINK consumer survey, Telecommunications Brand Equity Study at 1 (1996). *See also* Bell Atlantic Reply, CC Docket No. 96-115, filed June 26, 1996 at 4 and n.11 (citing to another recent poll showing that large numbers of consumers and businesses would defect from their current provider if they could not realize one-stop shopping, citing to Contra Cost Times, June 19, 1996 and attaching copy of article to filing).

Furthermore, certain filing parties provided the FCC with public opinion survey evidence demonstrating that customers were comfortable with carriers sharing individually-identifiable information internally within the same corporate enterprise.[40]

2. U S WEST Affirmative Consent Trial

U S WEST undertook a statistically valid trial at the end of the 1996 and the beginning of 1997 seeking to test the feasibility of securing written and oral affirmative customer consents. The trial involved (i) letters to customers, some accompanied by incentives (ranging from $1 to $5 prepaid phone cards) asking that affirmative approval be provided either in writing or through calling a toll-free number; (ii) outbound calls to customers attempting to secure oral approvals; and (iii) requests for approval through the ordinary course of customer inbound calls to U S WEST business offices.

The results of the U S WEST survey were filed with the FCC in September of 1997 and showed the devastating effect that an affirmative customer consent requirement would have on a carrier's ability to use CPNI internally as well the barrier to communication that such a consent requirement would impose. For example, the outbound **mail** campaign produced affirmative consents in the range of 6-11%. The offering of incentives appeared to have no material impact on the frequency with which consents were provided. The cost per affirmative response was $29.32, plus whatever incentive was offered ($1 to $5 phone cards), for a maximum total of

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[40] *See* Letter from Todd Silbergeld, Director, Federal Regulatory, SBC Communications Inc. to William F. Caton, Acting Secretary of the FCC, dated Oct. 20, 1997, attaching a copy of Study No. 934016, "Consumers and Credit Reporting 1994," Conducted for MasterCard International Incorporated and Visa U.S.A. Inc., Louis Harris and Associates, Inc. *See also* Letter from Gina Harrison, Director, Federal Regulatory Relations, Pacific Telesis, to William F. Caton, Acting Secretary of the FCC, dated Jan. 24, 1997, attaching a letter from Privacy & Legislative Associates, to A. Richard Metzger, Jr., Deputy Chief, Common Carrier Bureau (signed by Dr. Alan Westin and Robert R. Belair), dated Jan. 23, 1997 ("Privacy & Legislative Associates Letter"), which at Part IV, pp. 16-18 and n. 28 discusses this survey; Bell Atlantic Reply Comments (June 26, 1996) at 4-5 (mentioning that it had provided a copy of this report to FCC in 1994 and provided it again as an attachment to its Reply Comments).

$34.32. The outbound **calling** campaign produced consents in the range of 29%, with refusals in about the same amount. The cost per affirmative response was $20.66.

The largest percentage of affirmative consents were secured through the inbound calling channels in those circumstances where the customer had initiated the communication and was engaged in discussions about telecommunications.[41] Yet this approval venue is quite limited. U S WEST pointed out that it hears from at most about 15% of its customer base (between 10 and 13 million customers and access lines) in any given year, and some contacts are with the same customers. It could well take a decade or more to secure affirmative consents through this mechanism.

U S WEST also demonstrated the significance of the combined "no answer/hang up" response to its CPNI affirmative consent initiative. On average, 4.8 dialing attempts (at a cost of $5.89 per attempt) were necessary to reach a live respondent having authority to grant the necessary consent. In the outbound calling trial, U S WEST could not even establish communication with one-third of the customers that it attempted to contact. U S WEST explained that such difficulty might not necessarily be a problem in a general public opinion survey or telemarketing environment (where it is not uncommon to encounter large numbers of no answers or hang ups), because in those situations the lack of contact can be "corrected" — if larger numbers are desired — simply by increasing the size of the sample. But this solution could not be used in a CPNI affirmative consent regime. Both a "no answer" and a "hang up" count as a "no" with respect to CPNI consent.

Furthermore, U S WEST expressed its view that not only the customer "hang ups" but also some of the refusals to grant affirmative consent to use CPNI were as much the result of aversion to telemarketing as they were a considered response to the CPNI request based on its own merits. The initial call could itself have been deemed an intrusion on privacy, resulting in either a hang-up or a denial of consent.

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[41] U S WEST *Ex Parte, dated Sep. 11, 1997* at 9-10. *See also CPNI Order* at nn.390, 403 (noting this phenomena and that it had been repeated by other carriers).

With respect to the issue of customer "privacy" (the ostensible focus of Section 222), U S WEST also advised that the FCC's approach would only *increase* the volume of blanket telemarketing to subscribers because it would prevent carriers from targeting individual customers based on their likely subjects of interest. Marketing would therefore become less individualized and more intrusive in nature.

U S WEST also explained to the Commission that the low volume of responses to the requests for affirmative consents probably represented a lack of customer interest in the subject matter and a perception that the information being conveyed was not important. This explanation was supported by the about-even numbers of "yes" and "no" responses encountered across customer segments in both direct mail and oral outbound solicitations, without regard to the consumption profiles of telecommunications customers (*i.e.*, whether highly active telecommunications use or very little use). If the matter being communicated had been of interest to customers or considered important, it would be expected that highly active users would have responded differently than low-users.

U S WEST noted that previous FCC CPNI rules had rendered very few customer records unavailable to it.[42] However, as shown by the survey results, an affirmative consent requirement would prevent U S WEST from using the vast majority of its customer records to communicate with its subscribers. Furthermore, given the cost per affirmative response of up to $34.32 for outbound mail and of $20.66 for outbound calling, and given U S WEST's service population of over 11 million customers, U S WEST estimated that it would cost hundreds of millions of dollars to attempt to secure affirmative CPNI consents from its customer base. And even that immense expenditure would not assure contact with each individual, much less assure that the customer would have an interest in or consider the CPNI affirmative consent request on its merits.

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[42] U S WEST reported that, previously, only .06% of residential customers, 3.6% of small business and 33% of large business customers (a customer category that included competitors) had requested that CPNI be restricted.

3. Constitutional Analyses

U S WEST submitted a detailed First Amendment analysis by Professor Laurence Tribe (now counsel for petitioner and intervenors in this proceeding) of the First Amendment implications of an affirmative consent requirement.[43] Based on both judicial precedent and the evidence included in the then-existing record, Professor Tribe concluded that, given the clear First Amendment attributes of CPNI, Section 222 — which contains no affirmative consent requirement on its face — should not be construed to require a carrier to obtain prior affirmative customer consent before CPNI could be broadly used. Instead, Professor Tribe asserted that the Act should be interpreted as permitting an "opt-out" approval mechanism, whereby a carrier, after full and fair notice to customers, would be permitted to use CPNI across different service categories and among its affiliates, so long as customers did not object. The FCC dismissed Professor Tribe's analysis in a single footnote and two paragraphs of its *CPNI Order*. *CPNI Order* at n. 164 and ¶¶ 106-107.

In addition, various parties argued that the Commission's approach would impermissibly intrude on carriers' property rights. They noted that CPNI constitutes intellectual property belonging to carriers.[44] They urged the Commission to avoid rules that would raise constitutional questions under the Fifth Amendment.

4. Expert Views of Other Agencies

During the course of the proceedings, the FCC was advised of an analysis by the Privacy Working Group of the Clinton Administration's National Information Infrastructure Task Force

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[43] Letter from Kathryn Marie Krause, Senior Attorney for U S WEST to Mr. William F. Caton, Acting Secretary of the FCC, dated June 2, 1997 (cover letter and summary of Professor Tribe's conclusions) ("U S WEST Cover Letter"), attaching letter from Laurence H. Tribe to Messrs. A. Richard Metzger and John Nakahata and Ms. Attwood, dated June 2, 1997 ("Tribe Original Analysis"); letter from Laurence H. Tribe to Messrs. A. Richard Metzger and John Nakahata and Ms. Attwood, dated Sept. 10, 1997 (responding to MCI letter) ("Tribe Response").

[44] *See, e.g.,* Comments of USTA, CC Docket No. 96-115, filed June 11, 1996 at 8; Comments of GTE, CC Docket No. 96-115, filed June 11, 1996 at 13.

(NIITF),[45] as well as a prior study by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce.[46] Both organizations concluded that an opt-out method of customer approval was generally appropriate with respect to the commercial use of individually-identifiable information.

The NTIA Privacy Report explained that CPNI was not sensitive information, in contrast to personal information relating to health care, political persuasion, sexual matters and orientation, and personal finances, for example. NTIA Privacy Report at 20, 23, 25 n.98. The NTIA concluded that a notice-and-opt-out approach to CPNI was entirely consistent with individual privacy. It also acknowledged the procompetitive advantages associated with easy access and use of information like CPNI: "[T]he free flow of information – even personal information – promotes a dynamic economic marketplace, which produces substantial benefits for consumers and society as a whole." NTIA Privacy Report at 24, 25.

The conclusion of the NTIA Privacy Report was reinforced by a filing from the NTIA itself in the CPNI proceeding,[47] as well as by a separate filing by Dr. Westin.[48] Dr. Westin confirmed that an opt-out approval procedure for CPNI was appropriate.[49]

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[45] *See* "Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information, A Report of the Privacy Working Group" (Oct. 1995) ("Privacy Working Group Report").

[46] *See* U.S. Department of Commerce, NTIA, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information," (Oct., 1995) ("NTIA Privacy Report"). The FCC cited to this Report in its *CPNI Order* at ¶ 22 n.96. This report was referenced by various parties including U S WEST (at 16); BellSouth at 9, 14-17; SBC at 8-9, Pacific at 7-8 and Attachment A (containing a copy of the report).

[47] Reply Comments of NTIA, filed Mar. 27, 1997 at 25-27 (arguing that an opt-out process represented an appropriate process for securing customers' approvals, particularly in light of the existing business relationship).

[48] *See* Pacific Telesis, Ex Parte, CC Docket No. 96-115, dated Jan. 24, 1997 attaching the Privacy & Legislative Associates Letter at 4 (discussing both the Privacy Working Group Report and the NTIA Privacy Report, identifying as "sensitive" information (based on 1994 survey data) health and medical information, banking and credit information, insurance information).

[49] Privacy & Legislative Associates Letter at 9.

The carrier submissions to the FCC also included a copy of a recent Federal Trade Commission ("FTC") Report to Congress involving certain types of "locator" services. That report, which involved information far more sensitive than CPNI, generally endorsed the self-regulatory guidelines promulgated by the industry participants. Those guidelines included an "opt out" provision with respect to use of personally-identifiable information.[50]

F. FCC's CPNI Order

The *CPNI Order* is a 261-paragraph order purporting to implement a six-paragraph self-effectuating statutory provision. That the FCC managed to derive such a lengthy and detailed order from a statute otherwise hailed as "deregulatory,"[51] demonstrates how far the Commission strayed from Congress' intent. The FCC rejected the expert views of other agencies;[52] rejected authoritative evidence demonstrating the propriety of a notice-and-opt-out approval model; rejected the proposed statutory construction of petitioner and intervenors; and rejected the constitutional analyses submitted to the Commission.

Instead, the FCC adopted a series of rules forbidding carriers from using CPNI without prior affirmative customer consent to market and speak to both existing and future customers they believe would be receptive to new services. Under the FCC's so-called "total service approach," a carrier providing only local service to a particular customer would not be able to use CPNI, without prior affirmative customer consent, to speak to the customer regarding cellular or

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[50] Letter from Ben G. Almond, Executive Director-Federal Regulatory, BellSouth, to Ms. Magalie R. Salas, Secretary, Federal Communications Commission, dated Dec. 18, 1997 (reflecting the submission to the FCC of the FTC document, "Individual Reference Services: A Report to Congress," dated Dec. 17, 1997 and noting that the report "highlighted the use of an Opt-Out process to permit consumers access to their own non-public information").

[51] Joint Statement of Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

[52] *CPNI Order* at ¶ 94 and n.348 (specifically rejecting the Privacy & Legislative Associates submission) and n.353 (rejecting NTIA argument).

long-distance service. A carrier providing only long-distance service would be similarly constrained with respect to local or wireless services not currently provided to its customer.[53]

The result of the *CPNI Order* is that carriers who have an *existing relationship with customers* may not use CPNI associated with a customer's existing purchasing behaviors or service usage to determine that the customer would likely be interested in information about another service offering, *unless* the carrier has had a *prior* communication with the customer and has secured an affirmative consent to use the information in such manner. In short, the FCC forbade telecommunications carriers from using CPNI to speak unless they had secured prior affirmative consent from each of their millions of customers.

The FCC's rules create three unsatisfactory alternatives: (1) carriers can undertake the difficult and expensive task of seeking to secure prior affirmative consent from each of their customers; (2) carriers can stay mum and await a customer's spontaneous and affirmative inquiry of a carrier about "What's new?;" or (3) carriers can engage in a kind of "broadcast" speech to all customers, regardless of their individual purchasing characteristics and interests. Under each alternative, the *CPNI Order* bars individualized and customized speech.

The Commission reached this burdensome and impractical result by construing the term "approval" in Section 222(c)(1) to require prior affirmative consent from customers and by ruling out any other way of ascertaining customer approval — such as a notice-and-opt-out approval process. The FCC's rule is in no way commanded by the language of Section 222 or consistent with the deregulatory thrust of the 1996 Act. It is unprecedented with respect to commercial operations and speech in the United States. And it raises serious constitutional questions under both the First and Fifth Amendments.

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[53] The FCC applied a variation on this theme to a carrier's use of aggregate customer information. It held that if aggregated information was used to develop a profile of a customer most likely to be interested in a product or service that an individual customer meeting that profile could not be approached regarding an "out of service relationship" service *unless* that customer had provided prior affirmative consent for his/her CPNI to be "used" with respect to such contact. *See CPNI Order* at ¶ 149.

SUMMARY OF ARGUMENT

I. CPNI is an essential element of speech between carriers and their customers. Further, the internal sharing and use of CPNI within carriers is itself constitutionally protected speech. The *CPNI Order* violates the First Amendment by requiring that carriers secure prior affirmative consents from customers before using individually-identifiable customer information to speak with their customers on an individualized basis about services beyond the "categories" of telecommunications services to which they currently subscribe. In addition, the *CPNI Order* restricts the ability of carriers to share and use CPNI internally — to have different divisions, affiliates, and personnel within the same carrier communicate information to each other (*i.e.*, to speak to each other), absent a prior affirmative consent from the customer.

The FCC did not engage in a serious First Amendment analysis regarding the adverse speech impacts of its CPNI rules. Instead, it pretended there was no First Amendment issue on the facile theory that carriers remain free to speak to subscribers so long as they do not use CPNI to do so. But the First Amendment is concerned with "practic[al]" realities. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). It is undisputed that requests for affirmative consent have extremely low response rates. The practical effect of the FCC's *CPNI Order* will be to choke off meaningful, individualized speech that depends on CPNI. It is sophistry for the Commission to say that carriers theoretically remain free to speak, while it simultaneously withdraws the essential ingredient for educated communication. Indeed, by declining to examine the First Amendment issues associated with its Order in a serious fashion, the FCC failed at the most fundamental level to engage in reasoned decision making.

II. The *CPNI Order* also raises grave questions under the Fifth Amendment's Takings Clause. The Takings Clause protects stored proprietary data. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). CPNI is valuable intellectual property that belongs to *carriers*, not to *customers*. Yet the FCC quite cavalierly divested carriers of their property interest in CPNI. It deemed CPNI to be the customers' property and imposed a prior affirmative consent requirement that will have a devastating impact on carriers' ability to use CPNI for productive (indeed,

constitutionally protected) purposes. The Government may not, "by ipse dixit," decree that a private person no longer owns his property. "This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The FCC's analysis of the takings issues was the antithesis of reasoned decision making.

III. The *CPNI Order* is an unnecessarily severe construction of Section 222. It gratuitously raises constitutional issues where longstanding principles call for avoidance of such questions. The term "approval" in Section 222(c)(1) does not, as a matter of statutory interpretation, mandate the adoption of a prior affirmative consent requirement. Instead, the Commission could have allowed carriers to utilize a broad range of approval mechanisms, including affirmative consents if desired but also permitting notice and opt out processes where there is an existing service relationship between carrier and customer. Such approach, clearly narrower and less burdensome than that adopted by the FCC, would have fully protected customer privacy interests while avoiding constitutional questions.

For all of the above reasons, the *CPNI Order* and the accompanying rule amendments implementing the FCC's prior affirmative consent requirement for CPNI must be vacated.

ARGUMENT

STANDARD OF REVIEW

This Court has explained that it "review[s] agency action *de novo* to determine whether it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 410 (1997); *see also Hill v. NTSB*, 886 F.2d 1275, 1278 (10th Cir. 1989) (agency's "interpretation of constitutional or statutory provisions" is "reviewed *de novo*").

A. THE *ORDER* FAILS TO GIVE PROPER WEIGHT TO THE FIRST AMENDMENT INTERESTS IMPLICATED BY THE CPNI RULES

1. CPNI Is Information Whose Communication Is Subject to First Amendment Protection

CPNI is information whose communication is entitled to First Amendment protection. The creation, assembly, compilation, and/or communication of information lie at the core of what the First Amendment protects. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994).

It is fundamental that the First Amendment protects the right to use information to communicate with others. CPNI is valuable commercial information and an essential ingredient for communication between carriers and their millions of customers regarding not just the current service relationship but also regarding new and innovative services that customers may desire or find useful. In this respect, CPNI is to carriers what wire service reports are to newspapers — *i.e.*, the raw source material from which information and communications are crafted. In the case of CPNI, the information is communicated from one speaker to another within the carrier (*i.e.*, from one division or affiliate to another), and also forms the source of protected expression to customers.

The Supreme Court has applied the First Amendment to regulations falling on *physical* objects and substances (let alone bits or clusters of information) that are essential ingredients in expression, such as the newsprint and ink that were the subject of the tax invalidated by the Supreme Court in *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983), and the newsracks regulated by the laws struck down in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426-29 (1993), and *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988).

Furthermore, the First Amendment protects not only a speaker's right to solicit customers, *Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993), but also the audience's right to *receive* information. *Lamont v. Postmaster General*, 381 U.S. 301 (1965). With respect to both dimensions of the right to free speech, CPNI is information that is central to meaningful communication and well-informed customer decisions. It is precisely the kind of information that the Supreme Court has described as being the lifeblood of a free enterprise economy:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (*"Virginia Pharmacy"*). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995). Indeed, in other proceedings the FCC has frequently cited to *Virginia Pharmacy*, recognizing that "[t]he proper allocation of resources in our free enterprise system requires that consumer decisions be intelligent and well informed," *In the Matter of Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd. 6122 ¶ 18 (1998), and that the "dissemination of information as to who is producing and selling what product, for what reason, and at what price" is critical information for consumers. *In the Matter of Unsolicited Telephone Calls, Memorandum Opinion and Order*, 77 FCC 2d 1023, 1035-36 ¶ 32 (1980). Nowhere in the *CPNI Order* did the FCC so much as pay even lip service to these cardinal principles.

2. A Prior Consent Requirement for CPNI Is an Unconstitutional Burden on Speech

The *CPNI Order* unquestionably burdens speech. It prohibits carriers from using CPNI to market services outside the existing service relationship unless prior affirmative consent by customers is first obtained. For example, "a carrier whose customer subscribes to service that includes a combination of local and CMRS would be able to use CPNI derived from this entire service to market to that customer all related offerings, *but not to market long distance service to*

that customer, because the customer's service excludes any long distance component." *CPNI Order* at ¶ 30 (italics added). Thus, carriers are forbidden from using CPNI without prior affirmative customer consent to discuss with customers various categories of services that the customer may need or desire. If prior affirmative consent cannot be obtained, the *CPNI Order* bans the use of CPNI to tailor the communication.

In addition to the barrier the *CPNI Order* imposes on carrier-customer communications, it also restricts the right of common corporate affiliates and divisions, and of personnel within the same carrier, to share CPNI — to communicate information to each other.[54] These restrictions are imposed despite otherwise express congressional authority permitting local carriers to engage in joint marketing — to market as a single package local phone service together with other services that might be offered or managed through a separate affiliate or division, such as long distance and wireless services. *See* 47 U.S.C. § 601(d) (granting carriers joint marketing authority "[n]otwithstanding . . . any . . . Commission regulation"); 47 U.S.C. § 272(g)(3) (excluding joint marketing activities from certain identified non-discrimination obligations). By preventing carriers' separate divisions or affiliates from communicating CPNI to each other, even where Congress has explicitly granted the right for those divisions or affiliates to engage in joint marketing, the *CPNI Order* operates as a classic restriction on speech.

Accordingly, scholars have warned that "[r]egulations intended to protect privacy by outlawing or restricting the transfer of consumer information would violate rights of free speech." Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector* at 3 (Cato Institute Policy Analysis No. 295, Jan. 22, 1998). "From light conversation, to journalism, to consumer credit reporting, we rely on being able to

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[54] The FCC's CPNI rules provide: "If a telecommunications carrier provides different categories of service, but a customer does not subscribe to more than one offering by the carrier, the carrier is not permitted to share CPNI among the carrier's affiliated entities." 47 C.F.R. § 64.2005(a)(2). The rules also forbid a carrier from "disclos[ing] or permit[ting] access to CPNI" with regard to the provision of services "that are within a category of service to which the customer does not already subscribe to from that carrier, unless the carrier has customer approval to do so." *Id.* at § 64.2005(b).

freely communicate details of one another's lives. Proposals to forbid businesses to communicate with one another about real events fly in the face of that tradition." *Id.* at 1. *See also* Fred H. Cate, PRIVACY IN THE INFORMATION AGE 55 (Brookings 1997) (the First Amendment "fundamentally blocks the power of the government to restrict expression, even in order to protect the privacy of other individuals. . . . [The First Amendment] restrains the power of the government to control expression or to facilitate its control by private parties in an effort to protect privacy.").

In a variety of contexts, the Supreme Court has recognized that imposing a prior affirmative consent requirement in the context of otherwise protected communications is an unconstitutional burden on speech. For example, in *Martin v. Struthers*, 319 U.S. 141 (1943), the Court invalidated a city ordinance that forbade door-to-door solicitation unless the residents of the household had affirmatively requested the solicitor to approach. The Court opined that "[w]hether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants." *Id.* at 141. Here, the FCC has attempted to make the decision for all telecommunications customers in the entire United States.

Similarly, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court invalidated a requirement that the recipients of Communist literature notify the Post Office in advance that they wish to receive it. Most recently, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996), the Supreme Court struck down an affirmative opt-in rule for "patently offensive" cable programming. The Court opined that "[t]hese requirements have obvious restrictive effects" (*id.* at 2391), even apart from the reluctance of customers to order offensive material for viewing. *Id.* The Court predicted that "[f]urther, the added costs and burdens that these requirements impose upon a cable system operator may encourage that operator to ban programming that the operator would otherwise permit to run[.]" *Id.*

The *CPNI Order* is similarly unconstitutional because it impermissibly burdens speech. It imposes onerous prior affirmative consent requirements on information sought to be communicated internally, within a carrier, in support of protected speech with customers. The CPNI rules violate the rights of both speakers and listeners.

3. The Commission's First Amendment Analysis Was Flawed

The FCC did not engage in a conscientious First Amendment analysis. Instead, it tried to sweep the First Amendment issues under the rug. The FCC's theory was that, under its rules, "[c]arriers remain free to communicate with present or potential customers about the full range of services that they offer, and [its interpretation of] section 222 therefore does not prevent a carrier from engaging in protected speech with customers regarding its business or products." *CPNI Order* at ¶ 106. According to the Commission, no speech was burdened, let alone prohibited.

This reasoning is sophistry. First, the Commission completely overlooked the ban on a carrier's internal or corporate use of CPNI — on CPNI-related communications between various divisions and personnel within the same carrier. That ban on speech is in no way alleviated by allowing carriers the option of non-CPNI-related communications with customers.

Second, the Commission's argument flies in the face of the Supreme Court's teaching that the First Amendment is concerned with "practic[al]" realities. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). Without the use of CPNI, carriers cannot engage in customized or individualized speech with their customers. The FCC's approach relegates carriers to types of "broadcast" speech, when communication with their customers as individuals is much more meaningful, informative, and effective. The "broadcast speech" option cannot save the *CPNI Order* from its clear constitutional infirmities. As the Supreme Court has explained in striking down a ban on paid petition circulators, the fact that a regulation "leaves open 'more burdensome' avenues of communication, does not relieve its burden on first Amendment expression. The First Amendment protects [the speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Meyer v. Grant*,

486 U.S. 414, 424 (1988). Similarly, in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the Supreme Court struck down a state rule banning targeted solicitation letters by attorneys to potential clients known to have specific legal problems (in that case, persons facing foreclosure actions). The Court held that "the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." *Id.* at 473-74.

Thus, a law prohibiting newspapers from using wire service reports could not be saved by arguing that newspapers remained free to publish stories using other kinds of source materials. In *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), the Court invalidated a ban on in-person solicitation by CPAs (*i.e.,* a type of individualized and targeted speech), even though the regulation allowed accountants to solicit by mail or advertisement (*i.e.*, a type of broadcast speech). In *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995), the Court struck down a federal statute that prohibited the disclosure of alcohol content on beer labels (targeted speech), even though the statute permitted such disclosure in advertisements (broadcast speech). And, in a situation resembling the converse of the FCC's *CPNI Order*, it was no answer to the newsrack ban invalidated in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (a type of "broadcast" ban), that commercial leaflets might be distributed by hand (a type of individualized speech).[55]

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[55] *See also City of Ladue v. Gilleo*, 512 U.S. 43, 57 & n.16 (1994) (prohibition on residential signs invalid, even though it did not prevent homeowners from "taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign," or even from displaying flags with written messages); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 708-09 (1992) (Kennedy, J., concurring in the judgment) ("the Port Authority's regulation allows no practical means for advocates and organizations to sell literature within its airports"); *id.* at 715 (Souter, J., concurring in the judgment in relevant part) ("A distribution of preaddressed envelopes is unlikely to be much of an alternative.").

Here, the practical burden on speech is no less severe than those restrictions struck down by the Supreme Court. The FCC did not deny that its interpretation of Section 222 might "constrain carriers' ability to more easily 'target' certain customers for marketing." *CPNI Order.* at ¶ 106. The Commission recognized the importance of CPNI, agreeing that "the use of CPNI may facilitate the marketing of telecommunications services to which a customer does not subscribe." *Id.* at ¶ 104. Indeed, in the FCC's own words, "as competition grows and the number of firms competing for consumer attention increases, CPNI becomes a powerful resource for identifying potential customers and tailoring marketing strategies to maximize customer response." *Id.* at ¶ 22.

The FCC also acknowledged that "the form of approval has bearing on carriers' use of CPNI as a marketing tool" for new services. *Id.* at ¶ 86. The Commission did not, and could not, dispute that requests for affirmative consent have extremely low response rates. In fact, the FCC itself pointed to the U S WEST trial to show that U S WEST's outbound mail campaign produced affirmative consents in the range of 6-11% and that only about 29 percent of customers give their consent when "cold called" by a carrier. *Id.* at ¶ 111.

Thus, the FCC acknowledged that its *Order* "might make incumbent carriers' marketing efforts less effective and potentially more expensive" (*id.* at ¶ 66) and cited comments indicating that "restricting intra-firm use of CPNI makes product development and marketing more costly and less efficient, thereby raising prices and reducing the quality and variety of service." *Id.* at n.244. Indeed, "[d]evelopments in Europe, where regulations strictly limit the transfer of personal information, suggest that a mandatory opt-in regime would nearly wipe out direct marketing." *Supra at 26,* Solveig Singleton, *Privacy as Censorship*, at 12-13.

Moreover, even the obligation to *seek* prior affirmative consents (even if they could be obtained) itself imposes severe burdens on carriers. Making repeated unsolicited calls and other communications to subscribers to seek consent risks losing customer goodwill. Indeed, the FCC acknowledged that "[c]arriers that make frequent outbound calls to obtain oral approval . . . do so at the risk of losing their customer base." *CPNI Order* at ¶ 113. For carriers like U S WEST,

BellSouth and SBC, which collectively have over 91 million access lines and wireless subscribers, such a campaign would also be extremely labor-intensive, expensive, and lengthy. Speech would be suppressed for a significant amount of time, and the carriers would undoubtedly refrain from speech in situations where they otherwise would seek to communicate. In fact, U S WEST's study documented that the *CPNI Order* would prevent it from using the vast majority of its customer records to communicate with its subscribers and would impose enormous costs on U S WEST — running into the hundreds of millions of dollars — through attempts to secure customer affirmative CPNI consents, if the consents could be obtained at all.

Hence, the Commission's assertion that its *CPNI Order* does not burden speech is fanciful. In fact, it burdens speech so greatly as to make CPNI-supported expression utterly impracticable.

4. The *CPNI Order* Cannot Not Survive First Amendment Scrutiny

The Commission asserted that, even if expression is burdened, its prior affirmative consent requirement amounted at most to a restriction on commercial speech that passes muster under intermediate First Amendment scrutiny because "the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn." *CPNI Order* at ¶ 106. This conclusory claim does not suffice.

Under even intermediate First Amendment scrutiny,[56] a restriction on speech must be invalidated unless the Government **bears its burden** of demonstrating that the law "directly

[56] Commercial speech is defined as speech which proposes a commercial transaction. *See Virginia State Board. of Pharmacy*, 425 U.S. at 762. CPNI communications within a carrier itself — such as internal communications between different personnel or divisions within the same carrier — do not merely propose commercial transactions. Rather, they convey raw, factual information stemming directly from the service relationship. Such communications are thus entitled to full and undiluted First Amendment protection, rather than merely the intermediate scrutiny triggered by restrictions on commercial speech. However, because the *CPNI Order* cannot survive even intermediate scrutiny, *a fortiori* it could not pass muster under full First Amendment scrutiny.

advances" a "substantial interest" and "is no more extensive than necessary." *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996) (plurality opinion). In recent years, the Supreme Court has repeatedly struck down restrictions on commercial speech under this standard. *See Liquormart*, 116 S. Ct. at 1509-10; *id.* at 1521 (O'Connor, J., concurring); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-90 (1995); *Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 142-44 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993); *Edenfield v. Fane*, 507 U.S. 761, 767-68 (1993); *see also Revo v. Disciplinary Bd. of the Supreme Court of the State of New Mexico*, 106 F.3d 929, 935-36 (10th Cir.), *cert. denied*, 117 S. Ct. 2515 (1997).

The *CPNI Order* should similarly be invalidated, because the Government cannot meet its burden here.

a. The FCC Cannot Demonstrate the Existence of a Substantial Governmental Interest

The Supreme Court has instructed that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld v. Fane*, 507 U.S. 761, 770-71 (1993). That burden "is not satisfied by mere speculation or conjecture," *id.* at 770, or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing*, 514 U.S. at 490.

In this case, the FCC did not even articulate with any precision the privacy interest sought to be advanced. Nor did it deny that its *CPNI Order* will actually result in more invasions of customer privacy and solitude. If carriers cannot identify and communicate with individual customers based on their likely interest in receiving information about specific new services, they will be forced (in those instances where they do not remain silent) to use blanketed "broadcast-type" telemarketing speech fashioned for an "all customer" audience — the very sort of solicitations that the FCC itself has branded a nuisance. *See CPNI Order* at ¶ 113 (unsolicited telemarketing can be a nuisance); *BNA Third Order on Reconsideration*, 11 FCC Rcd. 6835,

6848-49 ¶ 23 (1996) ("unsolicited marketing contacts are in fact a nuisance, and we may take notice of this fact").

Even if the FCC could articulate a privacy interest in this case, it would be unduly speculative. The Commission itself has repeatedly and extensively documented, over many years, that an affirmative consent requirement is not needed to protect either customer privacy or competitive equity, and that there are many benefits to consumers from permitting CPNI to be used by carriers without prior affirmative consent. *See* pp. 7-8, *supra.* Without exception, reviewing courts have upheld the Commission's determinations. Further, the record demonstrates that use of service relationship or account information to discuss services, including "out of category" services, is consistent with customer expectations and that customers trust carriers to protect their privacy. *See* pp. 7-8, 12-15, *supra.* In fact, carriers with existing customer relationships have every incentive to cultivate customer goodwill and honor their customers' wishes. Moreover, expert agencies well versed in privacy issues have concluded that a prior affirmative consent requirement for individually-identifiable information such as CPNI is unnecessary and unwise. *See* pp. 18-19, *supra.*

Even in the *CPNI Order*, the FCC acknowledged that customer approval "can be *inferred* in the context of an existing customer-carrier relationship" in some circumstances. *CPNI Order* at ¶ 23 (emphasis in original). Thus, the FCC agreed "that Congress recognized . . . that customers expect carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service" (*CPNI Order* at ¶ 54); that there are no significant privacy concerns with respect to the sharing of CPNI within an integrated firm (*CPNI Order* at n. 203); and that "customers expect their carriers to offer related offerings within the total service to which they subscribe." *Id.* at n. 372; *see also* n. 206. Inexplicably, however, the FCC insisted that customer marketing expectations did not "extend to all of a carrier's available service offerings." *Id.* at n.372. The

Commission could cite no evidence to support this hair-splitting assertion. And its micro-managing cannot be squared with the central "deregulatory"[57] thrust of the 1996 Act.

The FCC's defense of the *CPNI Order* thus rests on the kind of impermissible speculation that cannot suffice under intermediate scrutiny. In *Turner Broadcasting*, a plurality of the Court explained that, even when Congress makes "unusually detailed" factual findings that "are recited in the text of the Act itself," 512 U.S. at 632, 646, in a First Amendment case a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrate[d] that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666. The cable must-carry rules were adopted by Congress along with extensive factual findings made in the text of the statute itself. In addition, the Court noted that the factual development on remand had yielded "a record of tens of thousands of pages" of evidence. *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1185 (1997) (*Turner II*) (internal quotation omitted). The Court stressed that there was a "substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions." 117 S. Ct. at 1190. The Court pointed to "specific support" for Congress' conclusion (*id.*): "substantive evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 1192-93); and "[e]mpirical research in the record before Congress" (*id.* at 1195).

In contrast, here the FCC cannot show any articulated or detailed congressional findings to support its position. Based on its position in the *CPNI Order*, the FCC will no doubt argue here that Congress, in adopting Section 222, essentially rejected the rationale underlying the Commission's prior CPNI regulations. But if the FCC's newly prescribed CPNI rules had truly been intended by Congress, one would expect — given their unprecedented nature — some discussion of the significance of a prior affirmative consent requirement in the legislative history

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[57] Joint Statement of Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

of Section 222. But no such discussion exists. The absence of such legislative history is equivalent to "the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing A. Conan Doyle, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335 (1927)).

And even if there had been some type of congressional expression of dissent with the FCC's previous regulatory approach, Congress may not by fiat override First Amendment rights simply by declaring existing administrative schemes inadequate. That much is clear from the Supreme Court's decision in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), which invalidated a federal "dial-a-porn" statute and rejected Congress' unsupported assertion that the FCC's previous rules were inadequate to protect minors. The Court held that, "[b]eyond the fact that whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law, our answer is that the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." *Id.* at 129. The Court noted that "[the legislative] record contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be," but only "conclusory statements" regarding the FCC's rules. *Id.* at 129-30. Here the legislative record does not contain even such "conclusory statements."

The FCC cannot establish the existence of a substantial governmental interest in this case.

b. The CPNI Rules Are Not Narrowly Tailored to Any Substantial Governmental Interest

Even if the Government could assert a substantial interest here, the *CPNI Order* would not be a narrowly tailored means of advancing it. A notice-and-opt-out rule, which enables a customer to request that CPNI pertaining to him not be used to contact him, gives the customer ample means to protect his privacy without trenching on speech. The FCC, along with other expert agencies, has previously documented in detail the wisdom of such a "do not disturb" policy, which is the constitutionally required solution. *See Martin*, 319 U.S. at 148. The notice-

and-opt-out approach is a familiar device in Fed. R. Civ. P. 23 class actions and other situations even when grievous personal injury, huge financial stakes, or other issues of great moment are at stake. It is certainly an obvious and simple alternative in the case of telephone company CPNI.

The proven availability of a notice-and-opt-out rule in this context demonstrates that the stringent approach taken in the *CPNI Order* is not narrowly tailored to the asserted interest. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's] goal[.]"); *Rubin v. Coors Brewing*, 514 U.S. at 490 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the statute] is more extensive than necessary."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566, 570 (1980) (government must make showing "that a more limited restriction" on speech "would not serve adequately the [governmental] interests").

The *CPNI Order* and the accompanying rule amendments are not narrowly tailored to any substantial governmental interest and are therefore invalid.

B. THE *ORDER* FAILS TO GIVE PROPER WEIGHT TO THE FIFTH AMENDMENT PROPERTY INTERESTS IMPLICATED BY THE CPNI RULES

The *CPNI Order* also raises grave constitutional issues under the Takings Clause of the Fifth Amendment. The Commission stripped carriers of their property interest in CPNI altogether by declaring that "to the extent CPNI is property . . . it is better understood as belonging to the customer, not the carrier." *CPNI Order* at ¶ 43.

The FCC implemented this pronouncement by imposing a prior affirmative consent requirement for carrier use of CPNI outside existing service categories. As already noted, such customer veto power on carriers' ability to use CPNI for productive (indeed, constitutionally

protected) purposes will have a devastating effect. In short, the *CPNI Order* denies carriers the ability to use their valuable property in order to promote the supposed social policies favored by the Commission.

Fifth Amendment analysis must begin with the Supreme Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), which held that the Takings Clause protects stored data and that the government's use of private proprietary research data constituted a compensable taking. Similarly, an appropriation of a carrier's proprietary commercial business information pertaining to its transactions with its customers amounts to a taking. As one scholar has concluded in the context of customer information, "[a] legislative, regulatory, or even judicial determination that denies processors the right to use their data could very likely constitute a taking and require compensation. . . . [F]or the billions of data files currently processed and used by U.S. individuals and institutions, a dramatic alteration on user rights makes a compelling case for the existence of a taking." Cate, PRIVACY IN THE INFORMATION AGE, *supra*, at 74.

The FCC's decree that CPNI belongs to customers, not carriers, does not avoid the takings principle. Rather, it *underscores* the constitutional violation. The Government may not divest a private person of his property "by ipse dixit. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The FCC "may not sidestep the Takings Clause by disavowing traditional property interests[.]" *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1931 (1998). In *Phillips*, the Supreme Court held that interest earned on client funds in IOLTA accounts is "private property" of the client, notwithstanding a state's attempt to deem the interest to be public property. In the same way, the FCC may not decree that carriers no longer own their customer information. *See also Preseault v. ICC*, 494 U.S. 1, 20 (1990) (O'Connor, J., joined by Scalia and Kennedy, JJ., concurring) (opining that federal agency could not override state-law entitlements by deeming reversionary interests preempted under federal law).

In this case, it is clear that CPNI belongs to a carrier, not to the customer. The telephone company, not its customers, owns its property. "The relation between the company and its

customers is not that of partners, agent and principal, or trustee and beneficiary." *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31 (1926). "Customers pay for service, not for the property used to render it....By paying bills for service, they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company." *Id.; see also Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 22 n.1 (1986) (Marshall, J., concurring in the judgment); *Simpson v. Shepard*, 230 U.S. 352, 454 (1913) (a utility's "property is held in private ownership").

CPNI is a record of the subscription for service which is provided and delivered over the *carrier's* network. CPNI is gathered, organized, maintained, and stored by carriers, not by customers. If a third party were to break into a carrier's computers and steal CPNI, it would be the carrier (and not individual subscribers) who would have a cause of action for conversion. The Commission did not deny that CPNI is "commercially valuable to carriers." *CPNI Order* at ¶ 2. The Commission itself explained that carriers "view CPNI as an important asset of their business" and "hope to use CPNI as an integral part of their future marketing plans." *Id.* at ¶ 22.

For the carriers who have spent billions of dollars accumulating CPNI on the settled understanding that they owned it, the FCC's proclamation that the property now belongs to customers upsets investment-backed expectations that the Takings Clause protects. *Monsanto,* 467 U.S. at 1005; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Indeed, the Supreme Court recently warned that "statutes should not be construed in a manner that would impair existing property rights," because doing so "can deprive citizens of legitimate expectations and upset settled transactions." *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2151 (1998) (plurality opinion) (internal quotation omitted). In *Eastern Enterprises*, the Court held that a federal coal miner health benefit statute could not be applied retroactively, with a plurality finding the law an impermissible taking, rather than an appropriate regulatory initiative, because of "the economic impact of the regulation, the extent to which the regulation interferes with investment-backed

expectations, and the character of the governmental action." *Id.* at 2146 (internal citation omitted).[58]

That CPNI pertains to the purchasing characteristics of customers does not give them a property interest in it. Even personal data like telephone numbers, addresses, social security numbers, and medical history — let alone records of purchases and economic transactions — are almost always owned by someone else: the Post Office, the government, a bank, or a physician or hospital.[59] A surveillance camera outside a bank or department store may capture the image of persons entering or leaving the establishment without their permission. The resulting footage belongs to the bank or the store, not to the customers, even though their images are depicted in it. 17 U.S.C. §§ 101-06. In the same way, "[a] data processor exercises property rights in his data because of his investment in collecting and aggregating them with other useful data. It is the often substantial investment that is necessary to make data accessible and useful, as well as the data's content, that the law protects." Cate, PRIVACY IN THE INFORMATION AGE, *supra*, at 74. As one noted scholar has observed, "the expand[ing] protection for commercial information reflects a growing awareness that the legal system's recognition of the property status of such information promotes socially useful behavior" and therefore encourages reliance by data processors. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 469 (1991).

To hold that customers rather than carriers own CPNI would have revolutionary implications for a panoply of service companies, such as credit card companies, mail order catalogs, direct marketing companies, and other databases housing comparable consumer

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[58] Justice Kennedy, concurring in the judgment and dissenting in part, would have applied the same factors as a matter of substantive due process.

[59] The Supreme Court has held that individuals have no reasonable expectation of privacy in the telephone numbers dialed from their phones, *see Smith v. Maryland*, 442 U.S. 735 (1979), or even with respect to checks and deposit slips used in banking. *United States v. Miller*, 425 U.S. 435, 443 (1976); *see also California Bankers Ass'n v. Schultz*, 416 U.S. 21, 69-70, 73-76 (1974) (upholding numerous banking transaction recordkeeping and reporting requirements).

information. The assets these companies have developed through the investments of billions of dollars would be wiped out. And if personal information is property of the customer, then the implication is that the "owner" must give permission for every use or collection of the information (personal address books and Rolodex files, for example), not just commercial uses. The consequences of the FCC's pronouncement are as staggering as they are unanalyzed by the Commission.

The Commission tried to defend its CPNI restrictions by maintaining that its *Order* "does not deny all economically beneficial use of property." *CPNI Order* at ¶ 43 (internal quotation). But the *Order does* destroy the value of that portion of the CPNI as to which consumer consents cannot be obtained. It may no longer be used for communications between corporate affiliates and divisions, or for communications with customers for new services outside the existing service relationship. Further, the Supreme Court has repeatedly rejected the FCC's argument that a regulation that does not take every last stick in a bundle of property rights cannot be a taking. In *Hodel v. Irving*, 481 U.S. 704 (1987), for example, the Court struck down a federal statute restricting the ability of Native Americans to pass certain undivided fractional interest in land to their heirs by intestacy or devise, even though they retained full beneficial use of the property during their lifetimes as well as the right to convey it inter vivos. The Court explained that "[t]he fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex inter vivos transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property." *Id.* at 716. In *Babbitt v. Youpee*, 117 S. Ct. 727 (1997), the Court reaffirmed this holding and invalidated an amended version of the same statute. The Court rejected the Government's contention that the statute satisfied the Constitution's demand because it did not diminish the owner's right to use or enjoy property during his lifetime, and did not affect the right to transfer property at death through non-probate means. The Court opined that "[t]hese arguments did not persuade us in *Irving* and they are no more persuasive today." *Id.* at 733.

The FCC's argument was also rejected in *Ruckelshaus,* where the Court specifically noted that the data submitted with a pesticide application has a variety of uses to the producer. *See* 467 U.S. at 1012 ("That the data retain usefulness for Monsanto even after they are disclosed — for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries — is irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right.").

Here, the *CPNI Order's* severe burden on carriers' ability to use CPNI to market new categories of services raises such serious Fifth Amendment questions that it should be invalidated.

C. THE *ORDER* IS A GRATUITOUSLY SEVERE CONSTRUCTION OF SECTION 222

In light of the serious constitutional questions presented by the FCC's interpretation of Section 222, the FCC was bound to construe the statute to avoid those constitutional questions. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[60]

When, as here, an administrative interpretation raises such constitutional concerns, the agency's construction of the statute is not entitled to deference. *Edward J. DeBartolo Corp.,* 485 U.S. 568 at 574-577; *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-743 (1983). In particular, the deference ordinarily afforded administrative action under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), is wholly inapplicable here. *See Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

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[60] *See also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (construing statute in light of First Amendment question "to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress"); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506-507 (1979); *Machinists v. Street,* 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Further, an agency's failure "to give adequate consideration" to constitutional objections to agency action is "the very paradigm of arbitrary and capricious administrative action." *Meredith Corp. v. FCC*, 809 F.2d 863, 865, 874 (D.C. Cir. 1987).

The need for clear congressional authorization is especially urgent where administrative action raises takings issues, for "[w]hen there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress's constitutionally granted powers of lawmaking and appropriation." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985); s*ee also United States v. Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982) (rejecting construction of statute that would raise taking questions); *Western Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904) (statutes are not read to delegate power to take property unless they do so "in express terms or by necessary implication"). Thus, in *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the Court of Appeals invalidated certain FCC rules in order to avoid a takings issue. The court held that Congress had not clearly granted the FCC the authority to take private property for public use and that the Commission was therefore forbidden from adopting regulations that "directly implicate[d] the Just Compensation Clause of the Fifth Amendment." *Id.* at 1445.

The same analysis is dispositive here, for the Commission's *CPNI Order* flouts all of these principles of restraint. The *Order* raises serious constitutional questions. Yet nowhere is there clear statutory language compelling the FCC's interpretation of Section 222 — much less an unmistakably plain congressional intent to impose such stringent CPNI rules. Indeed, the Commission itself confessed that the word "approval" was "ambiguous" (*CPNI Order* at ¶ 87), and that the statutory issues were sufficiently unclear that a "clarification of section 222" was necessary. *CPNI Order* at ¶ 14. The FCC acknowledged that, "while section 222(c)(1) requires customer approval for carrier use of CPNI outside the scope of sections 222(c)(1)(A) and (B), it does not expressly state the form of this approval." *CPNI Order* ¶ 91; *see also id.* at ¶ 86 ("section 222(c)(1) does not specific what kind of approval is required"). Indeed, the words

"prior," "express," or "affirmative" do not appear in Section 222(c)(1). By contrast, Section 222(c)(2) refers to an "affirmative" request. "When Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing." *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984).

There were numerous reasons that the Commission could and should have interpreted "approval" to include authorization pursuant to a notice-and-opt-out arrangement (for use of CPNI by carriers with existing relationships with the customers in question) rather than requiring only prior affirmative customer consent in order to avoid the constitutional issues raised by the *Order*:

• "Approval" can easily and reasonably be inferred in the context of an existing customer-carrier relationship. That is why the Commission adopted a "total service" approach that would permit a carrier providing both local and cellular service to a customer to use for marketing and speech purposes the CPNI from either service, *without seeking prior consent*:

> [T]he language of section 222(c)(1)(A) and (B) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be *inferred* in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within the existing relationship.

CPNI Order at ¶ 23 (emphasis in original). In the same way, approval can be inferred across service categories in the context of an existing customer-carrier relationship, especially when the customer is given an opt-out opportunity.

• Section 222(c)(1) uses the term "approval." The word "approve" "in its strictest etymological construction, is an after-the-fact ratification." *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company*, No. A 96-CA-397 SS, at 9-10 (W.D.Tex. 1996). In fact, the FCC itself cited a dictionary definition of "approve" as meaning

"ratify." *CPNI Order* ¶ 91 n.336. A notice-and-opt-out process is therefore a permissible way of ascertaining customer "approval."

• The FCC construed Section 222(c)(1) in a manner compelled by neither the language of the statute nor its legislative history, and in a manner at odds with the Commission's own long-standing position that requiring prior CPNI authorizations from customers was impracticable and unnecessary, and would result in substantial denials of consents due to customer inertia and confusion. There is no indication that Congress in the 1996 Act sought to depart so dramatically from this longstanding regulatory practice.

• Indeed, in light of the significant differences between Section 222 and earlier legislative proposals, it is plain that Congress specifically did *not* mandate affirmative consents from customers. Section 222 was based on S. 652 and H.R. 1555, which, in turn, emerged from a series of House bills proposed by Rep. Edward Markey. H.R. 3432, for example, would have required an "affirmative request" from the customer before a local exchange carrier could use CPNI beyond certain specified purposes. H.R. 3626, the next legislative proposal, expanded the scope of the proposal to all carriers. It also *removed* the word "affirmative" and substituted the word "approval." The legislative history thus suggests that Congress meant *not* to require "affirmative" customer consent in Section 222(c)(1).

• Furthermore, Congress itself acknowledged that customers want "one-stop shopping."[61] Moreover, to facilitate the integrated marketplace of the future, Congress explicitly granted telecommunications carriers joint marketing authority with respect to long distance,[62] electronic publishing,[63] and wireless services.[64] Joint marketing necessarily entails speech about different

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[61] *See* Senate Report on S.652 (Report No. 104-230) at 22-23 ("the ability to bundle telecommunications, information, and cable services into a single package to create 'one-stop-shopping' will be a significant competitive marketing tool" such that BOCs and their affiliates should be permitted to jointly market services).

[62] 47 U.S.C. § 272.

[63] 47 U.S.C. § 274.

[64] 47 U.S.C. § 601.

products and services, and the formulation of any such speech requires CPNI. As the FCC has acknowledged, "joint marketing . . . necessarily involves sharing of some customer network information." *Universal Card Order*, 8 FCC Rcd. at 8787 ¶ 27. There is nothing in Section 222 to suggest that Congress meant to erect an insurmountable barrier to communications about those services it allowed to be jointly marketed.

• The *CPNI Order* is utterly unprecedented. In situations ranging from credit cards to mail order catalogs to grocery purchases, companies are generally free to do whatever they wish with respect to individually-identifiable information generated in the course of the commercial relationship. Where regulations do exist (typically involving more sensitive information than is at issue in this case), they fall far short of the stringent rules adopted by the FCC here. For example, cable operators are allowed to use subscriber information for their own business purposes and are required to obtain written or electronic consent (*i.e.*, affirmative approval), *only* to share subscriber information with unaffiliated third persons. 47 U.S.C. § 551(c)(1). Under the 1996 Consumer Credit Reporting Reform Act, credit reporting agencies may furnish consumer credit information for marketing credit or insurance opportunities to consumers, so long as the agency establishes a toll-free number so that consumers can call and opt out by having their names removed from lists for direct marketing purposes. 15 U.S.C. § 1681b(c)(5). The Uniform Health Care Information Act, adopted by the National Conference of Commissioners on Uniform State Laws, *see* 9 U.L.A. 475 (1988 & Supp. 1992), creates an opt-out scheme for certain disclosures of medical information *Id.* at §§ 2-103, 2-104. The Driver's Privacy Protection Act of 1994 requires states to allow drivers to opt out of having personal motor vehicle information released. 18 U.S.C. § 2721(b)(11)-(12). Numerous states have adopted opt-out statutes for release of other public records information.[65] Even the Video Privacy Protection Act of 1988, adopted in response to the disclosure of the list of videos rented by Supreme Court nominees,

[65] Privacy & Legislative Associates Letter at 14.

allows disclosure of data about customer viewing habits for marketing purposes if the consumer has been given an opportunity to opt out. 18 U.S.C. § 2710(b)(2)(D).

In short, the universal legal baseline is that customers are not viewed as having the kind of privacy or property interests in commercial proprietary information that would grant them a legally enforceable right to veto transmission of the information to third parties, much less presumptively to deny the use of that information by the entity that created it. It is untenable to suppose, as did the FCC, that Congress would have intended so casually to depart from this baseline without comment beyond the choice of the word "approval."

• In issuing the *CPNI Order*, the Commission substituted its own (clearly revisionist) notions of "customer expectations" for solid record — including expert —evidence,[66] departed from long-standing Commission precedent, and disregarded the recommendations of agencies far more expert in the matter of customer privacy than the Commission. The FCC imposed its prior affirmative consent requirement in disregard of statistically valid public opinion survey evidence in the record documenting that customers trust their existing telecommunications carriers, expect CPNI to be used to market products and services of all types with them, and are even more comfortable with this use of CPNI when it is accompanied by a notice and opt out procedure. Although the Commission sought to dismiss this empirical evidence, the criticisms it offered were off-base[67] and flew in the face of the FCC's **own directive** to carriers regarding the

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[66] *Compare In the Matter of Petition to Promulgate a Rule Restricting the Advertising of Over-the-Counter Drugs on Television*, 62 FCC 2d 465, 468 n.11 (1976) (noting the FCC's lack of "claim to expertise in the field of behavioral research" and observing that "research focusing on emotionally and politically charged issues" "should best be left to independent organizations which are expert in such matters and have no direct responsibility for . . . regulation").

[67] The Commission claimed that one of the questions in the Westin study "refers to the examination of records by customer service representatives as 'normal' and implies that the representative will be looking only at the services the customer has before offering new services" and not more sensitive information "such as destination-related information." *CPNI Order* at ¶ 62. But the question carried no such implication. It stated: "[W]hen you call your local telephone company to discuss your services, the customer service representative that you speak with normally looks up your billing and account service record." *Id.* at n. 227 (quoting the question). The description of what a service representative "normally" does is accurate (*i.e.*,

importance of market survey evidence in fashioning arguments and crafting educated regulatory decisions.[68]

The Commission made no attempt to construe Section 222 in a manner that would avoid the constitutional questions under the First and Fifth Amendments. It devoted a **total of six paragraphs** (out of an *Order* containing 261 paragraphs) addressing the constitutional issues raised by petitioners.[69] By itself, this approach was an abuse of discretion and warrants vacating the *CPNI Order*.

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looks up the service record and, if appropriate, the billing record), and the reference to "billing information" clearly implies call-detail information, contrary to the Commission's assumption.

[68] *See In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, *Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 10674, at ¶ 49 (1997)(chastising AT&T and other commentors for failure to "cite to any relevant market research supporting their claims of consumer indifference or opposition" to proposed regulatory requirement); *In the Matter of The Revision of Programming and Commercialization Polices, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670, 98 FCC 2d 1076, ¶ 64 (1984) (noting approvingly the "empirical data" previously outlined by the FCC in its Notice of Proposed Rulemaking).

[69] The total might be increased by two paragraphs if one counts the paragraphs in which the FCC paraphrased the position of the commenters.

CONCLUSION

The petition for review should be granted; the *CPNI Order* and accompanying rule amendments to 47 C.F.R. §§ 64.2005 and 64.2007 should be vacated; and the matter should be remanded to the FCC for further consideration.

Respectfully submitted,

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August 13, 1998

STATEMENT REGARDING ORAL ARGUMENT

Petitioner and Intervenors request oral argument. This case presents free speech and takings questions with national significance, as well as important questions of statutory interpretation that are of first impression. Petitioner and Intervenors believe the Court would find oral argument helpful in reaching its decision.

ADDENDUM
(OF STATUTES AND REGULATIONS)

STATUTES

47 U.S.C.A. Section 222 (West Supp. 1998)

§ 222. Privacy of customer information

(a) In general

Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) Confidentiality of carrier information

A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

(c) Confidentiality of customer proprietary network information

(1) Privacy requirements for telecommunications carriers

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) Disclosure on request by customers

A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

(3) Aggregate customer information

A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a

telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) Exceptions

Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly, through its agents—

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

(e) Subscriber list information

Notwithstanding subsections (b), (c), and (d) of this section, a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

(f) Definitions

As used in this section:

(1) Customer proprietary network information

The term "customer proprietary network information" means—

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a

telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

(2) Aggregate information

The term "aggregate customer information" means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

(3) Subscriber list information

The term "subscriber list information" means any information—

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

(Pub.L. 104-104, Title VII, § 702, Feb. 8, 1996, 100 Stat. 148.)

REGULATIONS

1. AUTHORITY: 47 U.S.C. 1-5, 7, 201-05, 222.

PART 22 -- PUBLIC MOBILE SERVICES

2. § 22.903 [Remove].

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

3. The table of contents for Part 64 is revised to read as follows:

* * * * *

Subpart U -- Customer Proprietary Network Information

4. § 64.702 [Amended]

In § 64.702, remove paragraph (d)(3).

5. Subpart U is added to read as follows:

Subpart U --Customer Proprietary Network Information

§ 64.2001 Basis and purpose.

(a) *Basis*. These rules are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose*. The purpose of these rules is to implement section 222 of the Communications Act of 1934, as amended, 47 U.S.C. 222.

§ 64.2003 Definitions.

Terms used in this subpart have the following meanings:

(a) *Affiliate*. An affiliate is an entity that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another entity.

(b) *Customer*. A customer of a telecommunications carrier is a person or entity to which the telecommunications carrier is currently providing service.

(c) *Customer proprietary network information (CPNI).* Customer proprietary network information (CPNI) is (1) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the customer-carrier relationship; and (2) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier. Customer proprietary network information does not include subscriber list information.

(d) *Customer premises equipment (CPE).* Customer premises equipment (CPE) is equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

(e) *Information Service.* Information service is the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(f) *Local exchange carrier (LEC).* A local exchange carrier (LEC) is any person that is engaged in the provision of telephone exchange service or exchange access. For purposes of this subpart, such term does not include a person insofar as such person is engaged in the provision of commercial mobile service under 47 U.S.C. 332(c).

(g) *Subscriber list information (SLI).* Subscriber list information (SLI) is any information (1) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and (2) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

(h) *Telecommunications carrier.* A telecommunications carrier is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226(a)(2)).

§ 64.2005 Use of Customer Proprietary Network Information Without Customer Approval

(a) Any telecommunications carrier may use, disclose, or permit access to CPNI for the purpose of providing or marketing service offerings among the

categories of service (*i.e.*, local, interexchange, and CMRS) already subscribed to by the customer from the same carrier, without customer approval.

(1) If a telecommunications carrier provides different categories of service, and a customer subscribes to more than one category of service offered by the carrier, the carrier is permitted to share CPNI among the carrier's affiliated entities that provide a service offering to the customer.

(2) If a telecommunications carrier provides different categories of service, but a customer does not subscribe to more than one offering by the carrier, the carrier is not permitted to share CPNI among the carrier's affiliated entities.

(b) A telecommunications carrier may not use, disclose, or permit access to CPNI to market to a customer service offerings that are within a category of service to which the customer does not already subscribe to from that carrier, unless the carrier has customer approval to do so, except as described in paragraph (c) of this section.

(1) A telecommunications carrier may not use, disclose, or permit access to CPNI derived from its provision of local service, interexchange service, or CMRS, without customer approval, for the provision of CPE and information services, including call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services. For example, a carrier may not use its local exchange service CPNI to identify customers for the purpose of marketing to those customers related CPE or voice mail service.

(2) A telecommunications carrier may not use, disclose or permit access to CPNI to identify or track customers that call competing service providers. For example, a local exchange carrier may not use local service CPNI to track all customers that call local service competitors.

(3) A telecommunications carrier may not use, disclose or permit access to a former customer's CPNI to regain the business of the customer who has switched to another service provider.

(c) A telecommunications carrier may use, disclose, or permit access to CPNI, without customer approval, as described in this subparagraph.

(1) a telecommunications carrier may use, disclose, or permit access to CPNI, without customer approval, in its provision of inside wiring installation, maintenance, and repair services.

(2) CMRS providers may use, disclose, or permit access to CPNI for the purpose of conducting research on the health effects of CMRS.

(3) LECs and CMRS providers may use CPNI, without customer approval, to market services formerly known as adjunct-to-basic services, such as, but not limited to, speed dialing, computer-provided directory assistance, call monitoring, call tracing, call blocking, call return, repeat dialing, call tracking, call waiting, caller I.D., call forwarding, and certain centrex features.

§64.2007 Notice and Approval Required for Use of Customer Proprietary Network Information

(a) A telecommunications carrier must obtain customer approval to use, disclose, or permit access to CPNI to market a customer service to which the customer does not already subscribe to from that carrier.

(b) A telecommunications carrier may obtain approval through written, oral or electronic methods.

(c) A telecommunications carrier relying on oral approval must bear the burden of demonstrating that such approval has been given in compliance with the Commission's rules.

(d) Approval obtained by a telecommunications carrier for the use of CPNI outside of the customer's total service relationship with the carrier must remain in effect until the customer revokes or limits such approval.

(e) A telecommunications carrier must maintain records of notification and approval, whether oral, written or electronic, for at least one year.

(f) Prior to any solicitation for customer approval, a telecommunications carrier must provide a one-time notification to the customer of the customer's right to restrict use of, disclosure of, and access to that customer's CPNI.

(1) A telecommunications carrier may provide notification through oral or written methods.

(2) Customer notification must provide sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose or permit access to, the customer's CPNI.

(i) The notification must state that the customer has a right, and the carrier a duty, under federal law, to protect the confidentiality of CPNI.

(ii) The notification must specify the types of information that constitute CPNI and the specific entities that will receive the CPNI, describe the purposes for which CPNI will be used, and inform the customer of his or her right to disapprove those uses, and deny or withdraw access to CPNI at any time.

(iii) The notification must advise the customer of the precise steps the customer may take in order to grant or deny access to CPNI, and must clearly state that a denial of approval will not affect the provision of any services to which the customer subscribes.

(iv) The notification must be comprehensible and not be misleading.

(v) If written notification is provided, the notice must be clearly legible, use sufficiently large type, and be placed in an area so as to be readily apparent to a customer.

(vi) If any portion of a notification is translated into another language, then all portions of the notification must be translated into that language.

(vii) A carrier may state in the notification that the customer's approval to use CPNI may enhance the carrier's ability to offer products and services tailored to the customer's needs. A carrier also may state in the notification that it may be compelled to disclose CPNI to any person upon affirmative written request by the customer.

(viii) A carrier may not include in the notification any statement attempting to encourage a customer to freeze third party access to CPNI.

(ix) The notification must state that any approval, or denial of approval for the use of CPNI outside of the service to which the customer already subscribes to from that carrier is valid until the customer affirmatively revokes or limits such approval or denial.

(3) A telecommunications carrier's solicitation for approval must be proximate to the notification of a customer's CPNI rights.

(4) A telecommunications carrier's solicitation for approval, if written, must not be on a document separate from the notification, even if such document is included within the same envelope or package.

§ 64.2009 Safeguards Required for Use of Customer Proprietary Network Information

(a) Telecommunications carriers must develop and implement software that indicates within the first few lines of the first screen of a customer's service record the CPNI approval status and reference the customer's existing service subscription.

(b) Telecommunications carriers must train their personnel as to when they are and are not authorized to use CPNI, and carriers must have a [sic] express disciplinary process in place.

(c) Telecommunications carriers must maintain an electronic audit mechanism that tracks access to customer accounts, including when a customer's record is opened, by whom, and for what purpose. Carriers must maintain these contact histories for a minimum period of one year.

(d) Telecommunications carriers must establish a supervisory review process regarding carrier compliance with the rules in this subpart for outbound marketing situations and maintain records of carrier compliance for a minimum period of one year. Specifically, sales personnel must obtain supervisory approval of any proposed outbound marketing request.

(e) A telecommunications carrier must have a corporate officer, as an agent of the carrier, sign a compliance certificate on an annual basis that the officer has personal knowledge that the carrier is in compliance with the rules in this subpart. A statement explaining how the carrier is in compliance with the rules in this subpart must accompany the certificate.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-9518

U S WEST, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

BELLSOUTH CORPORATION. and
SBC COMMUNICATIONS INC., *et al.*,

Intervenors.

CERTIFICATE OF SERVICE

I, Robert B. McKenna, on this 13th day of August, 1998, do hereby certify that two copies of the foregoing **BRIEF FOR PETITIONER AND INTERVENORS** were caused to be served, via first-class United States mail, postage prepaid, upon each of the following persons:

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